2002

A.K. & R Whipple Plumbing and Heating v. Thomas D. Guy, Aspen Construction : Brief of Appellee

Utah Supreme Court

Steven B. Wall, Esq.; Wall and Wall; Attorney for Plaintiff/Appellee.
Joseph M. Chambers; Harris, Preston, and Chambers, P.C.; Attorney for Defendants/Appellants.

IN THE UTAH SUPREME COURT

A.K. & R. WHIPPLE PLUMBING AND HEATING,	:	Priority No. 15
Plaintiff/Appellee,	:	No. 20020495-SC
vs.	:	Trial Court Case: 940300014CN
THOMAS D. GUY and ASPEN CONSTRUCTION, a Utah corporation,	:	
Defendants/Appellants.	:	

APPELLEE'S BRIEF

on certiorari from a decision of the Utah Court of Appeals
on appeal from an Order of the
Third Judicial District Court
Summit County, Utah
The Honorable Frank G. Noel, presiding

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LIST OF PARTIES

1. A.K. & R. Whipple Plumbing and Heating (contractor), Plaintiff/Appellee (hereinafter referred to as "Whipple"), represented by Steven B. Wall of WALL & WALL, Salt Lake City, Utah.

2. Thomas D. Guy (homeowner) and Aspen Construction, Inc., a Utah corporation (builder), Defendants/Appellants (hereinafter referred to as "Aspen"), represented by Joseph M. Chambers of HARRIS, PRESTON & CHAMBERS, Logan, Utah.

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JURISDICTION

The Utah Supreme Court has jurisdiction over this matter pursuant to Utah Code Ann. §§78-2-2(5), 78-2a-4, and Utah R. App. P. Rules 3, 4, 45-51.

ISSUES PRESENTED FOR REVIEW

ISSUE: Did the Court of Appeals commit error by ruling that the term "successful party" is synonymous with the term "prevailing party" for the purpose of determining entitlement to attorney fees under the provisions of Utah Code Annotated §38-1-18?

STANDARD OF REVIEW: 1) "The Standard of Review on appeal of the

reasonableness of a trial court's award of attorney fees is patent error or clear abuse of discretion." *Faust v. Kai Technologies, Inc.*, 15 P.3d 1266 (Utah 2000)[1]

STANDARD OF REVIEW: 2) "The interpretation of a statute poses a question of law which this court reviews for correctness and without deference to the lower court's conclusions." *Zoll and Branch, P.C. v. Asay*, 932 P.2d 592, 593 (Utah 1997). The Court of Appeals determination that the terms prevailing party and successful party are synonymous involves the interpretation of a statute which an appellate court would accord no particular deference, but review for correctness.

CITATION TO RECORD WHERE ISSUE PRESERVED: Defendants' Memorandum of Points and Authority in Support of Defendants' Request for Attorney Fees filed November 2, 1999, Record 1975; Notice of Appeal filed November 17, 2000, Record 2050.

APPLICABLE STATUTES AND RULE

Utah Code Annotated §38-1-18:

> **§38-1-18. Attorneys' fees**. Except as provided in Section 38-11-107, in any action brought to enforce any lien under this chapter the successful party shall be entitled to recover a reasonable attorneys'

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[1] Defendant incorrectly characterizes the issue as being the trial court having incorrectly interpreted Utah Code Annotated §38-1-18 by denying to award Defendants their attorney fees, rather the issue concerns the reasonableness of the fees awarded or in this case not awarded. There is nothing in the record suggesting the trial court ruled that fees are not recoverable as claimed by Defendants therefore the standard of review is "abuse of discretion" not "review for correctness without deference to the lower court's conclusions."

fee, to be fixed by the court, which shall be taxed as costs in the action. *Amended by Laws 1961, c. 76; Laws 1995, c. 172, § 4, eff. May 1, 1995.*

STATEMENT OF THE CASE

A. NATURE OF THE CASE: This appeal is from the final judgment (on remand from the Utah Court of Appeals) of the Third District Court, Summit County, where the trial court, after crediting Aspen in the amount of $9,173.00 for the HVAC system towards Whipple's damage award of $8,646.00, denied Whipple's claim for relief of foreclosure of its mechanic's lien,[2] and entered a judgment against Whipple in the amount of $527.00. However, because Aspen's monetary recovery was negligible and it lost it's Counterclaim, the trial court considered the outcome "a draw" and declined to award Defendants their attorney fees.

B. COURSE OF PROCEEDINGS AND DISPOSITION IN COURT BELOW:

1) After four and one-half days of trial, Judge Noel ordered foreclosure of two of Whipple's mechanics liens and awarded $23,779.33, in damages (inclusive of $7,500.00 attorney fees awarded per §38-1-18 U.C.A.; §3,966.82 interest -- from August 1, 1993 to March 15, 1997; and $3,470.90 costs of suit.) (Judgment ¶3 dated March 7, 1997, recorded in Book XX pages 311-316 - Addendum 3)

2) Following an appeal (first appeal) by Aspen, the Utah Court of Appeals entered

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2 See Aspen's Addendum "1" - Whipple's Notice of Claim of Lien filed September 14, 1993.

an order remanding the matter to the trial court for disposition consistent with its opinion. *A.K. & R. Whipple Plumbing & Heating v. Aspen Const.*, 977 P.2d 518 (Utah App. 1999). After remand, the trial court held a telephone conference with the attorneys and set deadlines to submit memoranda as to the remaining issues identified by the Utah Court of Appeals for resolution by the trial court. The trial court held a hearing on November 10, 1999, at which time the trial court heard arguments and took evidence (by way of affidavit) as to the reasonable attorney's fees incurred by the parties. On January 20, 2000, the trial court entered its Memorandum Decision as to the remaining issues - Record 2022. The trial court, after calculating the offset for the HVAC system towards Whipple's recovery entered a money judgment in favor of the homeowner and Aspen and against Whipple in the amount of $527.00. The trial court declined to award either party their reasonable attorney fees based upon an analysis which, while resulting in a monetary award to Defendants of $527.00, actually calculated a net advantage to Whipple in the amount of $17,473.00. Based thereon, the court was of the opinion that the outcome was essentially "a draw" and concluded neither party should be awarded it's fees.

Sometime in September, 2000, Whipple's attorney submitted Amended Findings of Fact and Conclusions of Law and an Amended Order of Foreclosure as directed by the trial court in the Memorandum Decision. The trial court signed the amended pleadings which were filed with the clerk of the court on October 18, 2000. On November 17,

2000, the Defendants filed a Notice of Appeal in relationship to the trial court's failure to award the Defendants their reasonable attorney fees incurred in successfully defending against the lien foreclosure proceeding in this action.

On March 14, 2002, the Court of Appeals entered its decision upholding the trial court. On May 6, 2002, the Court of Appeals entered an order denying Aspen's Petition for Rehearing. Aspen sought certiorari, which this court granted.

C. STATEMENT OF FACTS: For purposes of this appeal Whipple respectfully submits the following as being relevant for this appeal[3]:

1. The trial court occurred over 4 1/2 days -- October 11-12, and November 28, 29, and 30, 1995, during which time the court took evidence of the work which Whipple claimed to have provided to the three (3) separate properties.[4] Whipple sought lien recovery identifying 11 separate claims:[5]

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[3] A detailed summary of the underlying facts in this case are set forth fully in *A.K. & R. Whipple Plumbing & Heating v. Aspen Const.*, 977 P.2d 518 (Utah App. 1999), a copy of which is included as Addendum "5"to Aspen's Brief of Appellant.

[4] The three lien foreclosure actions which were consolidated for purposes of trial are referenced hereinafter for the convenience of the Court as: (1) the Dianne Quinn property lien; (2) the Tom Guy pool house property lien; and (3) the Thaynes Canyon property lien.

[5] Whipple's claims related to the Thaynes property are summarized as follows:

Reference	Amount
Laterals (sewer)	$10,200.00
French drains	$ 3,162.05
Backhoe	$ 780.00
Plumbing	$13,358.00
Heating	$12,265.50

Reference	Amount	Property
1. Sewer laterals	$10,200.00	Thaynes
2. Thomas Guy pool house	$ 1,665.92	Pool house
3. Diane Quinn sump pump	$ 1,100.00	Quinn
4. Municipal water line re-location	$ 6,660.80	Thaynes
5. French drains 77 Thaynes Canyon Dr.	$ 3,162.05	Thaynes
6. Backhoe 77 Thaynes Canyon Dr.	$ 780.00	Thaynes
7. Pool house miscellaneous	$ 65.00	Pool house
8. Diane Quinn gas line	$ 631.00	Quinn
9. 77 Thaynes house plumbing	$13,358.00	Thaynes
10. 77 Thaynes house heating	$12,265.50	Thaynes
11. 77 Thaynes house gas piping	$ 1,015.00	Thaynes
Total Jobs	$50,903.27	
Payments	<$17,000.00>	Thaynes
Principal Balance Due	**$33,903.27**	

(Exhibit 12 included as Aspen's Addendum 2.)

2. Whipple was a licensed plumbing contractor but an unlicensed HVAC (Heating, Ventilation and Air Conditioning) contractor. At the outset of the litigation, Aspen filed a Motion to Dismiss the HVAC portion of the mechanics' lien claim which Judge Brian granted, however, Whipple was allowed to recover the value he conferred on the Thaynes Canyon property. During the trial Judge Noel allowed Whipple to introduce evidence as to the HVAC claim and eventually allowed Whipple to recover for such on an "equitable basis." (Judge Brian's Pretrial Ruling of May 8, 1995 (Record 113) and Judge Noel's Trial Minute Entry (Record 262)).

Gas piping	$ 1,015.00
Gross Claim	$40,780.55
Less Payments	<$17,000.00>
Net Claim	**$23,780.55**

3. A timely appeal was filed which was transferred to the Court of Appeals.

4. On March 18, 1999, the Court of Appeals entered an opinion (first appeal) remanding this matter to the trial court for disposition of the matter consistent with its opinion stating:

> ¶31 The Utah mechanics' lien statute provides "in any action brought to enforce any lien under this chapter the *successful party* shall be entitled to recover reasonable attorneys' fee, to be fixed by the court, which shall be taxed as costs in the action." Utah Code Ann. §38-1-18 (1997). In this case, although the trial court initially granted Aspen's motion to dismiss the HVAC portion of Whipple's mechanics' lien claim because of improper licensure, it went on to award Whipple the value of the work performed on Aspen's property. Based in part on this finding, the trial court concluded that Whipple was the prevailing party and entitled to an award of attorney fees. However, this conclusion may be erroneous in light of our determination that section 58-55-604 precludes Whipple from recovering for its HVAC work. Based upon our review of the record, it appears the HVAC claim was the single most important issue in this case and Aspen, having fully prevailed on the HVAC claim in this appeal, may now be entitled to prevailing party status under section 38-1-18. If on remand the trial court determines Aspen is the prevailing party under section 38-1-18, then Aspen must be given the opportunity to present evidence regarding attorney fees incurred in pursuing its claim. We therefore remand this issue to the trial court for a redetermination of the attorney fees award consistent with this opinion and the entry of findings necessary to support the revised award. [Emphasis supplied by the Appellants.] (p. 525) *A.K. & R. Whipple Plumbing & Heating v. Aspen Const.*, 977 P.2d 518, *cert. denied*, 994 P.2d 1271 (Utah 1999).

A more complete summary of the underlying facts are set forth fully in *A.K. & R. Whipple Plumbing & Heating v. Aspen Const.*, 977 P.2d 518 (Utah App. 1999) cert. denied, 994 P.2d 1271 (Utah 1999). (Addendum 5 of Aspen's Brief) Shortly after the

remand, the trial court held a telephone conference with the attorneys and set deadlines to submit memoranda as to the remaining issues identified by the Court of Appeals for resolution by the trial court. (Telephone conference with Judge Noel held September 13, 1999.)

5. On November 2, 1999, Aspen submitted their Memorandum of Law and Affidavit of Attorney's Fees which detailed the dates the work was performed, the hourly rate, the time spent, and described in detail the nature of the services performed. Additionally, the Aspen's attorney allocated the fees between: (1) the successful claims for which there may have been entitlement to fees; (2) the unsuccessful claims for which there would have been a claim for fees had the claims been successful; and (3) the claims for which there would be no entitlement to attorney's fees. (Aspen's Attorney's Affidavit - Record 1975)

6. The trial court held a hearing on November 10, 1999, in Salt Lake City. The court heard arguments and took evidence from the homeowner and builder's attorney as to the reasonable attorney fees incurred by the homeowner and builder. Whipple's attorney argued at the hearing that he could not allocate the fees between the three properties, but after the hearing submitted his affidavit apportioning his attorney fees between the three properties. (Record 2062, Transcript of Hearing, Salt Lake City, Utah, November 10, 1999)

7. On January 20, 2000, the trial court entered its memorandum decision as to the

remaining issues. The trial court denied Whipple's claim for relief of foreclosure of its Thaynes Canyon property mechanics' lien and entered a judgment against Whipple in the amount of $527.00. (Record 2022) The initial appeal and subsequent remand involved three (3) separate lien foreclosure matters which were consolidated for trial. The trial court held for Whipple on the other two (2) lien foreclosure matters, determined the lien amounts ($631.00 and $1,666.00 respectively), found Whipple to be the "successful party" with respect to those liens, determined $2,500.00 to be the reasonable attorney fees related to each of those lien foreclosure matters ($5,000.00 total), and entered orders foreclosing those two parcels of property respectively. (Record 2022) (Those judgments of foreclosure have subsequently been paid and satisfied by Aspen.)

8. Notwithstanding Whipple's failure to obtain an order of foreclosure of its Thaynes Canyon property mechanics' lien, the trial court declined to award Aspen its reasonable attorney fees incurred in successfully defending against the foreclosure, which they had requested pursuant to §38-1-18 U.C.A. (Record 2022)

9. In September 2000, Whipple's attorney submitted Amended Findings of Fact and Conclusions of Law and an Amended Order in accordance with the trial court's January 20, 2000, Memorandum Decision. These were subsequently signed by the trial court and were later entered by the clerk on October 18, 2000. (Record 2029) On November 17, 2000, Aspen filed a Notice of Appeal in relationship to the trial court's failure to award it it's attorney fees based on its net recovery of $527.00. No cross

appeal was filed by Whipple. (Record 2050)

10. In March of 2002 the court of appeals upheld the trial court and on May 6, 2002, denied Aspen's Petition for Rehearing. (The opinion on the second appeal of the Court of Appeals is found at Addendum 6 to Aspen's Brief.)

SUMMARY OF ARGUMENT

The Court of Appeals correctly determined that the terms "successful party" and "prevailing party" have historically been used interchangeably and therefore are synonymous for the purpose of determining entitlement to attorney fees under the provisions of Utah Code Annotated §38-1-18. Notwithstanding Aspen's argument to the contrary this judicial confirmation of what has heretofore been an accepted interpretation by our appellate courts in no way changes the outcome of this case or future cases to be decided under Utah Code Annotated §38-1-18. Moreover, there is no distinction or different criteria used in determining a prevailing party from a successful party. Therefore, because the trial court considered and weighed the various factors relative to the outcome of the Thaynes Canyon property claim in it's decision to not award either party its fees and costs it's decision should not be overturned.

REBUTTAL ARGUMENT

I. Response to Legal Analysis.

Aspen posits the theory that the terms prevailing party and successful party are mutually exclusive and that to view the terms as synonymous will create ambiguity and

disparate results. Notwithstanding its claim, Aspen has not put forth any authority that would support this contention. Aspen has not cited any case law or statute that demonstrates that the terms successful party or the criteria to determine successful party is or has been different from the term prevailing party or the criteria to determine prevailing party.

What Aspen appears to do by way of its appeal is to attempt to convince this court that such a distinction does exist and that the distinction is that a successful party is determined by one who obtains a net judgment, in other words, an advantage however slight without regard to any other consideration, while a prevailing party is determined only after a balancing and consideration of various factors related to the outcome a "flexible and reasoned" approach. It is only by this distinction that Aspen can maintain that its paltry recovery of $527.00 in a case where total claims of $65,780.55 were involved, entitles it to successful party status and thus a significant award of attorney fees. Aspen recognizes that consideration of anything other than a "net judgment rule" would defeat any hope of prevailing and support the trial court's ultimate conclusion that the matter was essentially a draw or worse, a net advantage for Whipple, if value is factored in for the successful defense of claims.

At the outset of its argument, Aspen identifies eight Utah mechanic's lien cases where there was a successful party and said successful party was awarded its attorney fees. These cases are distinguishable from this matter in that they involved parties who's

claims were not reduced or compromised. In other words, even under the definition of prevailing party as put forth by Aspen, the result would not have been different. Nevertheless, Aspen has failed to show how the results would have been different had these parties been identified as prevailing parties. Moreover, Aspen has further failed to demonstrate that the successful parties in these cases were defined merely as one who obtained a net judgment. The fact is the many cases of this jurisdiction dealing with a prevailing party and successful party are not distinguishable from one another. The Court of Appeals correctly pointed this out in *A.K. & R. Whipple Plumbing & Heating v. Thomas D. Guy; and Aspen Construction, a Utah Corp.,* 2002 Ut. App. 73 (Whipple II), which held:

> "¶ The terms "prevailing party" and "successful party" are often used synonymously. See *Cobabe v. Crawford*, 780 P.2d 834, 835 n.1 (Utah Ct. App. 1989). Black's Law Dictionary defines the term "prevailing party" as: "A party in whose favor a judgment is rendered, regardless of the amount of damages awarded (in certain cases, the court will award attorney [ ] fees to the prevailing party). Also termed successful party." Black's Law Dictionary 1145 (7th ed. 1999). Black's defines a "successful party" as follows: "See prevailing party." Id. Perhaps the most compelling example of synonymous usage is our decision in Whipple I, where, referring to the "successful party" language of section 38-1-18, we consistently substituted the words "prevailing party" in our analysis. Whipple I, 1999 UT App. at ¶¶31, 40; see also Reeves, 915 P.2d at 1079 (holding a successful party includes one successfully enforces or defends against a lien action); *J.V. Hatch Constr., Inc. v. Kampros*, 971 P.2d 8, 15 (Utah Ct. App. 1998)

> ("[A] lien claimant's prima facie evidence establishing its right to attorney fees is met by showing that it is the prevailing party in the mechanics[']s lien cause of action.")."

To further show the fallacy of Aspen's argument, we note the Court of Appeals in *Mountain States Broad. Co. v. Neal*, 783 P.2d 551 (Utah Ct. App. 1989), defines a prevailing party the same as Aspen defines "successful party", to-wit: one who either obtains a net judgment or who successfully defends and avoids an adverse judgment. The Court of Appeals held as follows:

> "Typically, determining the "prevailing party" for purposes of awarding fees and costs is quite simple. Plaintiff sues defendant for money damages; if plaintiff is awarded a judgment, plaintiff has prevailed, and if defendant successfully defends and avoids an adverse judgment, defendant has prevailed."

Clearly, these two terms have historically been used interchangeably and while heretofore this may have created some confusion, the Court of Appeals ruling in Whipple II has finally clarified this issue, eliminating the potential for any future confusion. This clarification does not, as Aspen suggests, make the determination of successful party under Utah Code Annotated §38-1-18, more difficult nor will it create a different result than previously decided cases.

Aspen further cites footnote 7 of *Mountain States* for the proposition that prevailing party analysis is a different, more complex approach which makes a determination more difficult, particularly when there are multiple claims and parties and

that to apply this analysis to a mechanics lien case with a "successful party" standard creates the potential for more confusion and makes the determination of a successful party more difficult. This argument is not only specious but wrong.

First, there is no authority that defines successful party merely and exclusively as one who obtains a net judgment and foregoes any analysis of competing claims to determine successful party status.

Second, even if a successful party were defined exclusively as one who obtained a net judgment, Aspen has failed to demonstrate how this standard would eliminate the difficulty of determining successful party status where multiple parties and/or claims were involved, where perhaps each of several parties may have prevailed on different claims. And even if Aspen would argue that utilizing the net judgment rule would eliminate the difficulty of determining the successful party in a case of multiple parties and/or claims (which it won't), then wouldn't it make more sense to merely adopt the net judgment rule for both successful party and prevailing party (assuming arguendo that the two (2) terms are mutually exclusive) thereby eliminating the difficulty which might occur in a prevailing party analysis (as defined by Aspen) where multiple parties or claims are involved. In other words, if a successful party analysis as proposed by Aspen is more expedient than the prevailing party analysis as proposed by Aspen, then the adoption of a net judgment rule for a prevailing party analysis seems the more logical approach.

The fact of the matter is that notwithstanding Aspen's argument to the contrary a net judgment rule does not ensure the absence of difficulty or absolute predictability of outcome where multiple parties and/or claims are involved and would more often than not cause inequitable results. Consequently, a net judgment rule under such circumstances is no more expedient than the flexible and reasoned approach which the courts of this jurisdiction have heretofore utilized in determining prevailing or successful party status.

II. Response to Legislative Presumptions and Prior Judicial Constructions.

Aspen's argument in this section is merely a restatement of its prior argument. Because Aspen has failed to establish that judicially, the terms prevailing party and successful party are mutually exclusive and have different meanings or legal effect its argument that the Court of Appeals declaration that these two terms are synonymous somehow contravenes legislative intent is unfounded and purely specious. The fact of the matter is as noted by the Court of Appeals in *A.K. & R. Whipple Plumbing & Heating v. Aspen Constr.*, 2002 Ut.App. 73 (Whipple II), these two terms have consistently been used interchangeably and there is no precedent in this jurisdiction that treats these terms differently.

III. Response to Public Policy.

Because Aspen has failed to demonstrate that our court's have distinguished prevailing parties from successful parties and in light of the numerous cases where our

court's have used these terms interchangeably there is no basis to conclude that the Court of Appeals decision has abrogated the concept of stare decisis.

IV. Response to Legal Analysis as Applied to the Facts of this Case.

At the outset of Point IV, Aspen makes assumptions that are not totally correct or are not presented in the right context thus giving an erroneous impression. Therefore, for the purpose of factual clarification, Whipple offers the following:

1. Admittedly, the Thaynes Canyon property was the largest of the three liens nevertheless, Whipple was forced to spend significant time preparing for and litigating the other two claims since Aspen never conceded either of these claims and required Whipple to draft and file pleadings and liens, interview, depose and subpoena witnesses, prepare documents for trial and prove said claims at trial where Aspen failed to present any defense to either of these claims.

2. The HVAC claim was not the single most important claim rather the plumbing contract was (see Aspen's Addendum 2).

3. Aspen did not prevail on its counterclaim of a defective HVAC system. Aspen was given a $7,000.00 offset an amount far short of its $25,000.00 counterclaim.

4. While Aspen prevailed on certain claims it conspicuously failed to identify the claims Whipple prevailed on relative to the Thaynes Canyon property which were as follows:

Sewer laterals	$10,200.00
Plumbing	$12,158.00
Gasline	$ 1,015.00
Backhoe	$ 100.00
Defense of Aspen's Counterclaim	$18,000.00
	$41,473.00

5. Curiously, the court never identified the deficiencies or assigned value to any specific deficiencies in the HVAC system except the relocation of a heat vent which Whipple identified would cost a few hundred dollars. Furthermore, the entire HVAC system which Aspen claimed required replacement was never replaced and the home was sold with the system as Whipple had installed it with minor completion work and fine tuning since Whipple was discharged from the job before its completion.

In Point IV of its argument, Aspen assigns error on two points. First, the trial court erred when it held that Aspen's negligence claim against Whipple was not inextricable from its HVAC claim and second, that the trial court's award of attorney fees to Whipple for its unmitigated successful prosecution of the Diane Quinn property lien and the Thomas Guy Poolhouse property lien, while denying Aspen's its fees for its nominal money judgment on the Thaynes Canyon property was illogical and inconsistent.

As to its first challenge Whipple is unclear as to the point Aspen is attempting to make. The fact the trial court held the HVAC licensing issue and Aspen's negligence claim were not "inextricably tied together" has no bearing on the ultimate outcome unless Aspen is suggesting that Whipple's non-licensure automatically renders it negligent, a

theory neither advanced by Aspen or supported by law or the facts.

As to Aspen's second challenge Whipple contends that Aspen's argument is patently wrong. To suggest there is no distinction between Whipple's success and recovery of its attorney fees relative to the Diane Quinn property lien and Thomas Guy Poolhouse property lien and Aspen's nominal recovery and no award of it's attorney fees relative to the Thaynes Canyon property is incredulous. As noted *supra* the Quinn and Thomas Guy claims were unequivocal and unmitigated wins. (Even though, Aspen failed to mount any defense at trial to these two claims they made Whipple draft and file pleadings and liens, interview and subpoena witnesses, prepare exhibits, incur costs related to filing liens, lawsuits, and subpoenaing witnesses, and spend time preparing for and trying these two claims, a clear act of bad faith, whereas the Thaynes Canyon property litigation involved total claims of $65,780.55 and resulted in a mere net recovery for Aspen of $527.00. Is it any wonder the trial court concluded this claim was essentially a draw.

A. Response to Evidentiary Basis.

Initially, Aspen points out in this argument that prior to the court's hearing on the issue of attorney's fees, it submitted its affidavit of fees incurred in this matter and therein apportioned said fees to the three lien cases. Aspen also claims that most of it's fees related to the Thaynes Canyon property.

Aspen further explains that a lien claimant generally must prove that he enhanced

the value the property and that because Aspen proved deficiencies in the HVAC system and obtained reductions and offsets of other claims (none of which related to deficient work but rather, were due to unfinished work or work that had been done which the court determined had not been contracted for between the parties), that it establishes Whipple did not enhance the value of the property and therefore it is the successful party.

In response Whipple contends that it also submitted a breakdown of it's attorney fees related to the various properties and likewise the greatest amount was apportioned to the Thaynes Canyon property.

Whipple challenges Aspen's claim that a mechanic's lien claimant must prove that he enhanced the value of the property to prevail and points to Aspen's failure to cite any authority in support of this claim. Nevertheless, Whipple contends that where Aspen received the benefit of the installation of the french drains in the amount of $3,162.50, the use of the backhoe at a cost to Whipple of $680.00 at least $5,265.00 of value for the HVAC system which Aspen was not required to pay for (HVAC contract price of $12,265.00 - deficiencies of $7,000.00 = $5,265.00) and since the home was sold with the furnaces and duct work as originally installed by Whipple it can be argued that the true value conferred on the property was really the entire contract price of $12,265.00 it is clear the value of the property was enhanced. So notwithstanding Aspen's argument to the contrary Whipple did confer a significant benefit on the Thaynes Canyon property for which Whipple was never compensated.

Moreover, while Whipple was unable to foreclose its lien Aspen did not prevail to such an extent that it should be considered the successful party. While Aspen is quick to point to the fact that it prevailed on a few of Whipple's claims, it fails to point out that of its alleged six successful claims, two of these, the french drain and backhoe, were successful only because there were no contacts for this work not because the work was not performed or the work or was deficient (keeping in mind that but for this minor technicality either one of these claims being transferred to Whipple's column would have changed the net outcome); the relocation of the Park City Water line did not relate to the Thaynes Canyon property and the $2,000.00 offset of the plumbing contract related only to unfinished work since Whipple was discharged from the job site without the opportunity to complete the job.

The point being, is that when all of the evidence is presented it is obvious that the trial court did not lose sight of anything. To the contrary, when the trial court's ruling is viewed in the context of all the facts the trial court's conclusion that the outcome was essentially a draw was a generous concession to Aspen.

B. Response to Trial Court's Analysis.

In subparagraph B of Section IV of its Argument, Aspen attempts to make three arguments. The first argument is found in the second paragraph where it again argues that because the Court awarded Whipple it's fees for prevailing on the Diane Quinn property lien and the Thomas Guy Poolhouse property lien, it was error for the Court not

to award Aspen its fees for preventing Whipple from foreclosing its lien on the Thayne's Canyon property concluding that this fact alone entitled Aspen to successful party status.

Again, Aspen ignores the holdings in *Mountain States and Occidental* where the court rejected a "net judgment" rule and acknowledged the necessity of a reasoned and flexible approach in determining successful party status. The Court of Appeals in *Whipple II* referred to these two opinions in pertinent part as follows:

> ¶16 The plaintiffs in Occidental claimed a balance due of over $600,000.00 resulting from a trustee sale. See id. The defendants asserted that the sale was valid but stipulated to a $7,300.00 deficiency notwithstanding the sale. See id. As a result, plaintiffs obtained a judgment of approximately $7,300.00 and argued that they should therefore be deemed the prevailing party and thus be entitled to attorney fees. Defendants argued that they should be the prevailing party because they had successfully defended against plaintiffs claim for $600,000.00, and the court agreed. See id. at 222. Using a "flexible and reasoned approach" the court determined that, regardless of having prevailed on this issue, obtaining a judgment for a small fraction of the amount sought was not enough to warrant a recovery of attorney fees. Id. (Emphasis added.)

Therefore, the trial court or the Court of Appeals did not commit error by refusing to declare Aspen as the successful party merely because it obtained a net judgment of $527.00 from combined disputed claims of $65,780.55 relative to the Thaynes Canyon property. To adopt Aspen's recommended approach is to adopt a "net judgment" rule which this court has rejected on more than one occasion.

The second argument concerns Aspen's attempt to convince this court that it

prevailed to a greater extent than acknowledged by both the trial court and the Court of Appeals therefore rendering it the successful party. In support of its position, Aspen assails the two court's computations and claims a great injustice has resulted, however, Aspen's computation is in error which error was previously pointed out in Whipple's Response to Petition for Rehearing filed in the Court of Appeals in *A.K. & R. Whipple Plumbing and Heating v. Aspen Const.*, 2002 Ut. App. 73 (Whipple II). Again, the analysis of the various claims is set forth hereafter:

> Initially, it needs to be pointed out that Aspen erroneously claims that Whipple's claims on the Thaynes Canyon property were originally $47,441.35. In fact, Whipple's claims on the Thaynes Canyon property were $40,780.55. The explanation of the discrepancy is illustrated as follows:

Whipple's lien as claimed by Aspen		Whipple's lien as claimed by Whipple	
Laterals (sewer)	$10,200.00	Laterals	$10,200.00
Municipal Water Re-location	$ 6,660.80[6]	French Drains	$ 3,162.05
French Drains	$ 3,162.05	Backhoe	$ 780.00
Backhoe	$ 780.00	Plumbing	$13,358.00
Plumbing	$13,358.00	Heating	$12,265.50
Heating	$12,265.50	Gas Piping	$ 1,015.00
Gas Piping	$ 1,015.00	Subtotal	$40,780.55
Subtotal	$47,441.35	Less Payments	<$17,000.00>
Less Payments	<$17,000.00>	Total Claim	$23,780.55
Total Claim	$30,441.35		

Aspen's argument is flawed in four respects. First, it has included a claim in the Thaynes Canyon property in the amount of $6,660.80 for the relocation of a municipal

[6]This claim did not relate to the Thaynes Canyon property.

water line which was never part of the Thaynes Canyon property lien. Second, while the court may have erred in calculating the total claim of the Thaynes Canyon property, it did not affect the net recovery of Aspen. Third, the difference between the amount acknowledged as the total claim of Whipple by the Court of Appeals, to-wit: approximately $30,000.00 and the amount Whipple sought at trial, to-wit: approximately $40,000.00, relates to assigning value for successfully defended claims. And if it is Aspen's contention that value for successfully defended claims be factored in to determine successful party status, an approach Whipple readily welcomes, then Whipple would attain a net advantage of $17,473.00. This is illustrated by the following analysis:

TRIAL COURT'S ANALYSIS OF DAMAGES INCLUDING VALUE FOR SUCCESSFUL DEFENSE OF CLAIMS

1. Water and sewer laterals from curb to house		$ 3,200.00
2. Plumbing ($14,158.00 less $2,000.00 for offsets)		$12,158.00
3. Gas line		$ 1,015.00
4. Backhoe		$ 100.00
5. Water and sewer laterals from the street to the curb		$ 7,000.00
6. HVAC ($12,265.00 contract price less $3,092.00 to finish)		$ 9,173.00
TOTAL DUE WHIPPLE		$32,646.00
AMOUNT PAID BY DEFENDANTS:	-	$17,000.00
Offset for damages based on deficient work	-	$ 7,000.00

Less contact price per Court of Appeals	-	$ 9,173.00
GRAND TOTAL (due Aspen)		($ 527.00)
Whipple's successful defense of Defendants' Counterclaim in the amount of $25,000.00 ($25,000.00 minus $7,000.00 offset for deficient work = $18,000.00)		$18,000.00
NET ADVANTAGE FOR WHIPPLE		$17,473.00

Aspen's third argument is to challenge one of the reasons the trial court gave for concluding that Aspen was not the successful party. The court stated:

> "Moreover, the court thinks there is an additional reason to award no fees. The only reason that the defendant received a net recovery, is because it prevailed on an essentially legal issue, that is that the plaintiff's failure to obtain a contractors license prevented him from collecting on an equitable basis for the installation of the HVAC.

In order to address this argument, it is helpful, if not absolutely necessary, to understand the context of the court's statement.

First, it was Aspen's contention from the outset that the three furnaces installed needed to be replaced (T. p. 108 ¶19-21). After the trial, the court found the only problem with the heating system was leakage and poor air flow to one room as well as no ducts to the wet bar area. (Whipple's Addendum 1). Whipple testified that these items could be corrected for a few hundred dollars. It is also worth noting that Whipple was discharged from the job before the heating job was complete, explaining why some

problems remained.

The court gave Aspen $7,000.00 to correct the minor deficiencies although the record is devoid of any evidence as to what the cost to repair said deficiencies would be. Furthermore, the home was listed and sold by Aspen without replacing the furnaces or ducts as Aspen claimed needed to be done.

It was clear to the court that based on the dismissal of Whipple's HVAC claim, Aspen was receiving three furnaces at no cost and that they had not prevailed to any significant extent on the merits of it's counterclaim. Clearly, the court in it's discretion concluded that prevailing under these circumstances was certainly less compelling than prevailing on the merits of their claim. Nevertheless, omitting this as a justification for the court's refusal to award Aspen it's fees does not change the outcome or render the trial court's refusal to award Aspen it's attorney fees any less efficacious.

Additionally, Aspen seems to believe that it's claim to successful party status and attorney fees is enhanced because Whipple pursued its HVAC claim despite the court's determination that it lacked the proper license. Whipple did nothing more than what the court permitted and that was to seek recovery under a quantum merit theory as allowed by the court's ruling on May 8, 1995 (Whipple's Addendum 2) which certainly was not without precedent. (See *Govert Copier Painting v. Van Leeuwen*, 801 P.2d 163 (Utah. App. 1990))

Finally, Aspen challenges the trial court's determination that the licensure issue

and its negligence claim were not "inextricably tied together" and contends that if this court finds that the two claims were "inextricably tied together" that it is automatically elevated to successful party status. In support of its claim, it cites the holding in *First General Services v. Perkins*, 918 P.2d 480 (Utah App. 1996).

Aspen's logic is wrong and the *First General* case is distinguishable. Assuming arguendo that the licensing issue and the negligence claims are "inextricably tied together." Does that change the net outcome of the case? No. Aspen's recovery is not increased nor is the outcome of its counterclaim changed favorably. Whether the claims are inextricably tied together or not does not affect the net outcome of this case one whit.

Aspen cites the holding in *First General Services v. Perkins*, 918 P.2d 480 (Utah App. 1996), for the proposition that because the Court of Appeals awarded the contractor fees for both it's lien foreclosure and defense of counterclaim that it should be awarded it's fees because it prevailed on the licensure issue and received a net judgment of $527.00.

First General involved a situation where the claimant would have prevailed under any analysis since it's claim was uncompromised, whereas Aspen, while prevailing on the licensure issue, prevailed by less than one percent (1%) of total claims related to the Thaynes Canyon property and lost as to $18,000.00 of its counterclaim. *First General* is clearly distinguishable for the following reasons:

Aspen:

1) Aspen did not prevail on its counterclaim.

2) Aspen received judgment in an amount equal to less than one percent (1%) of the total claims.

3) Aspen's only unmitigated success was prevailing on the licensing issue.

First General:

1) Claimant prevails completely on its lien.

2) Claimant totally defeats counterclaim.

Notwithstanding the foregoing analysis, the authority of this jurisdiction has heretofore taken into consideration more than the net judgment to determine successful party status (see *Occidental v. Mehr*, 791 P.2d 217 (Utah App. 1990), and more may be required to establish successful party status than to demonstrate success on these two claims regardless of the kind of claims that are involved.

Whether the licensure issue and negligence claim are inextricably tied together or not seems irrelevant in this case because it does not change the ultimate outcome of the parties and, in fact, it can be argued that tying the negligence claim and licensure issue together does not enhance Aspen's claim for successful party status rather it detracts from it since while Aspen prevailed on the licensure issue it lost on its negligence claim.

CONCLUSION

The Court of Appeals has, by its holding in *Whipple II,* done nothing to vitiate prior case law or alter the definition or effect of Utah Code Annotated §38-1-18. To the

contrary, the court's clarification, or if you will, judicial confirmation of a previously acknowledged principle has eliminated the confusion associated with the court's interchangeable use of the terms successful party and prevailing party as it applies to claims brought under Utah Code Annotated §38-1-18.

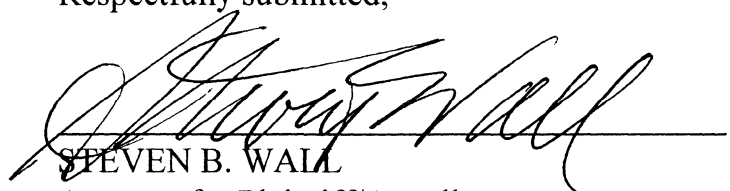
Aspen's attempt to convince this court to now create two judicial constructions so a "net judgment" rule becomes the law relative to mechanics lien claims would overturn prior judicial interpretation and in the final analysis would be, by far and away, the most inequitable approach. To take away the trial court's discretion to consider the totality of facts in a particular case and hamstring a judge so he or she is compelled to award disproportionate fees relative to the amount of a particular judgment is simply bad law.

Aspen's attempt to convince this court to award it significant attorney fees on a recovery of less than one percent (1%) of total claims has no legal precedent in this jurisdiction and for obvious reasons, the court should deny it's request.

Whipple respectfully requests that this court deny Aspen's appeal and confirm the Court of Appeals ruling in *Whipple II*. Finally, Whipple requests that it be awarded its attorney fees and costs related to all appeals which Whipple has prevailed on. This request has been made in previous appeals, however the Court of Appeals has, for some unknown reason, ignored this request.

DATED this 25th day of March, 2003.

Respectfully submitted,

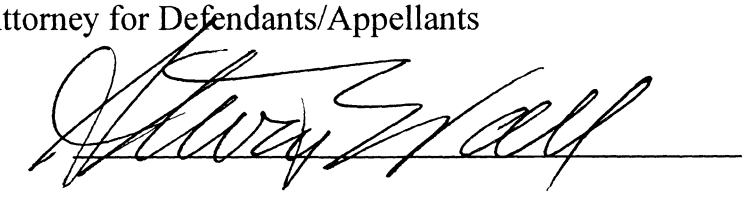


STEVEN B. WALL
Attorney for Plaintiff/Appellee

CERTIFICATE OF SERVICE

This is to certify that one (1) true and correct copy of the foregoing Appellee's Brief was [X] mailed, postage prepaid, [ ] sent via facsimile transmission, [ ] hand-delivered on this 25th day of March, 2003, to the following:

Joseph M. Chambers
HARRIS, PRESTON & CHAMBERS
31 Federal Avenue
Logan, Utah 84321
Attorney for Defendants/Appellants



Tab 1

IN THE THIRD JUDICIAL DISTRICT COURT

SUMMIT COUNTY, STATE OF UTAH

	:	MINUTE ENTRY
A K & R WHIPPLE PLUMBING AND H	:	
PLAINTIFF	:	CASE NUMBER 940300014 CN
	:	DATE 11/30/95
VS	:	HONORABLE FRANK G NOEL
	:	COURT REPORTER WALTON, HAL
GUY, THOMAS D	:	COURT CLERK JDO
ASPEN CONSTRUCTION DEFENDANT	:	

TYPE OF HEARING: NON JURY TRIAL
PRESENT: PLAINTIFF DEFENDANT

P. ATTY. WALL, STEVEN B
D. ATTY. CHAMBERS, JOSEPH

COURT'S RULING:

MINUTE ENTRY
Whipple v. Aspen Construction

As a preliminary matter the court has reviewed Judge Brian's order carefully and is of the opinion that he intended that Whipple be compensated, on an equitable basis, for the work done and benefit conferred on the premises, with adjustments for Aspen's costs to finish the work and to correct any work that needed correcting. The matter has been prepared for trial and tried to the court with that understanding.

At closing argument counsel for Aspen argued that Whipple had not met the threshold requirement of establishing mechanics liens. However it is the courts recollection that there was oral evidence that liens had been filed, to which there was no objection, and in addition the case was tried over a four and one-half day period without any objections to any of the evidence of Whipple's claimed damages on the basis of no mechanic's liens. The court is going to allow the claims of Whipple to stand.

Turning to the merits of the claims of the parties, the court finds and rules as follows:

- That the work performed by Whipple installing laterals from the curb to the house was not included in the written contracts between the parties for the plumbing work and awards Whipple $3,200 for that work.
- That Whipple is owed $1,666 for work performed on the Tom Guy pool house.
- That on the issue of the relocation of the Park City irrigation line the testimony of Kevin Monson is the more credible and accordingly awards Whipple nothing for that work.
- That Aspen's testimony as to the french drain the more credible and awards Whipple nothing for that claim.
- The court awards Whipple $100 for use of the backhoe.
- The court awards Whipple $631 for the Quinn gas line.
- That Whipple is entitled to $13,000 on its plumbing contract plus $1,158 for extras.
- That Aspen is entitled to a $2000 offset on the plumbing contract for costs to finish.
- That Whipple, in equity is entitled to $9,173 on its heating contract with Aspen. ($12,265 less $3,092 for Aspen's costs to finish.)
- The court is of the opinion that Aspen has shown by a preponderance of the evidence that there are deficiencies in the heating system. (Leakage and poor air flow to one room as well as no ducts to a portion of the basement in the area of the wet bar.) Aspen has failed to show by a preponderance of the evidence, however, that it will be necessary to completely remove the existing system and install a new system. Aspen has also failed to show that the 3 furnaces currently installed are inadequate or that the ducting into and out of said furnaces is improperly sized. Mr. Neely's testimony on this issue was vague at best. The ducting at the furnaces meets Uniform Mechanical Code requirements. It has not been shown to the satisfaction of the court that any specifications or recommendations of the manufacturer have not been met. The evidence of a higher industry standard was vague and not convincing to the court.

The court is further of the opinion that many of the problems may be addressed with further adjustments and fine tuning of the system such as complete installation of thermostats as designed by Whipple, connecting and operating of zone dampers etc. However, some work will need to be done to correct the deficiencies mentioned by the court and for that the court awards Aspen $7,000.

- That Whipple is entitled to $1,015 for gas line installation.
- That Whipple has already been paid $17,000.

The court, therefore calculates the amount due and owing Whipple to be $3,943.

The court is of the opinion that neither party has clearly prevailed and therefore will award no attorney's fees.

Counsel for Aspen is to prepare more detailed findings of fact, conclusions of law and a judgement consistent with this ruling and submit them in the proper manner for the court's signature.

Case No: 940300014 CN

Certificate of Mailing

I certify that on the 1st day of Dec., 1995, I sent by first class mail a true and correct copy of the attached document to the following:

✓STEVEN B WALL
Atty for Plaintiff
SUITE 800
BOSTON BUILDING
SALT LAKE CITY UT 84111

JOSEPH CHAMBERS
Atty for Defendant
31 FEDERAL AVENUE
LOGAN UT 84321

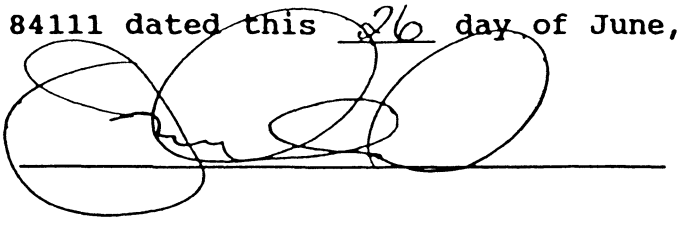
District Court Clerk

By: Joye D. Ovard
Deputy Clerk

Tab 2

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the above and foregoing ORDER to Steven B. Wall, Suite 800, Boston Building, Salt Lake City, UT 84111 dated this 26 day of June, 1995.



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has been tested and it has been carefully inspected and is found to be operational in all respects in conformity with the contract specifications and customary standards of industry including all express and implied warranties and representations and the home otherwise restored to its present finished condition then the Plaintiff will be permitted to recover from the Defendant the difference on what has been spent and what it cost. In this respect the Defendant is not out of any money that was not contracted for up front but will have received the benefit of his bargain. Because the benefit will have been thus conferred compensation will then be due to the Plaintiff. The court feels that this is only fair and so finds and orders

~~Because the corrective work will entail work encompassing at least two or more fields of contracting (carpentry, sheetrocking, painting, as well as the underlying HVAC work) the inspections and work must be completed by and under the supervision of independent licensed general contractor with adequate qualifications~~ who is absolutely unacquainted with either side directly or otherwise, and the corrective work, whatever it may be, is to be performed within a reasonable period of time. The court would think that that should be accomplished by July 15, 1995. June 15, 1995

This ruling is without prejudice as to the remaining issues and is intended to resolve the Motion to Dismiss with respect to the HVAC work only. The system and work must meet code and it must pass the various independent inspections specified above.

DATED this ___ day of June, 1995.

HONORABLE PAT B. BRIAN

contractor[2] that the statute in question is mandatory in its application and that in the totality the Plaintiff's failure to comply with the statute is sufficient grounds for the Motion to Dismiss to be granted as a matter of law with the following provisions:

The court still believes that there is a requirement to apply principles of equity, whenever fairness and justice mandates. The court will permit the Plaintiff to have independent licensed contractors to examine the Plaintiff's work as will be necessary to correct the problems. The court will permit the Defendant to undertake the same inspections. The licensed contractors who undertake to examine the Plaintiff's work are to be totally independent of the Plaintiff and the Defendant. They are not to be friends, work associates, acquaintances or in any other way be suspect of any bias or prejudice in or on behalf of the Plaintiff or the Defendant.

If the work performed by the Plaintiff needs correcting and the estimates obtained by both the Plaintiff and Defendant are comparable, the court will permit the Plaintiff to engage the services of the necessary licensed contractors to correct the work to the satisfaction of a ~~licensed mechanical engineer~~ building inspector who is ~~familiar with the customary standards of the HVAC industry with regards to adequacy of furnaces, air flow, and its distribution, overall design and layout and any other standards customary to the HVAC industry~~. Once the heating system has been connected and it

---

[2] *In accordance with the recent decision in American Rural Cellular, Inc., v. Systems Communication Corp., ____ P.2d ____, 258 Utah Adv. Rep. 1317 (1995) the Defendant's status is only one factor (see discussion page 17).*

Joseph M. Chambers 0612
PRESTON & CHAMBERS
Attorney for Defendants
31 Federal Avenue
Logan, Utah 84321
(801) 752-3551

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SUMMIT COUNTY, STATE OF UTAH

A.K. & R. WHIPPLE PLUMBING AND HEATING Plaintiff, vs. THOMAS D. GUY and ASPEN CONSTRUCTION, a Utah corporation Defendants.	*	ORDER Civil No. 94-03-00014 CN

This matter came before the court on May 8, 1995, for oral argument with regards to the Defendant's Motion to Dismiss in relationship to the Plaintiff's failure to be properly licensed in accordance with Section 58-55-604 Utah Code Annotated.[1]

The court having considered the parties' legal memorandums and the submissions made during oral arguments, the court finds and rules as follows on the Defendant's Motion to Dismiss:

IT IS HEREBY ORDERED, ADJUDGED & DECREED:

1. The statute Section 58-55-604 U.C.A. is controlling in this case. A threshold requirement for the Plaintiff to recover is the compliance with the foregoing statute regarding licensing. The court finds that notwithstanding that the Defendant is a general

[1] *During oral arguments the Defendant's counsel made it clear that the foregoing motion was made only with regards to the HVAC work and not the plumbing work except to the limited extent that there may be an offset as to the plumbing work.*